

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

MARY KATHERINE HAYDEN,)	
)	
Plaintiff,)	Case No. 2:01CV00125
)	
v.)	OPINION AND ORDER
)	
UNITED STATES OF AMERICA,)	By: James P. Jones
)	United States District Judge
Defendant.)	

Michael A. Bragg, Bragg & Associates, PLC, Abingdon, Virginia, and S. Strother Smith, III, Abingdon, Virginia, for Plaintiff; Julie C. Dudley, Assistant United States Attorney, Roanoke, Virginia, for Defendant.

Mary Katherine Hayden, the plaintiff, filed the present action in the Circuit Court of Wise County, Virginia, against Wendell Caldwell, the postmaster at Big Stone Gap, Virginia, claiming damages as a result of the intentional infliction of emotional harm. The United States removed the action to this court, based upon the certification by the United States attorney that Caldwell was acting within the scope of his employment as an employee of the United States at the time of the conduct alleged in the suit papers. Pursuant to the provisions of the Federal Tort Claims Act,¹ the court entered an order substituting the United States as defendant in place of Caldwell.

¹ 28 U.S.C.A. §§ 2671-2680 (West 1994 & Supp. 2001) (“FTCA”).

The plaintiff objected to the certification, contending that Caldwell was not acting within the scope of his employment when he committed the acts complained of. I permitted limited discovery, and an evidentiary hearing was held on March 4, 2002, on the question of whether Caldwell was acting within the scope of his employment. Based on the evidence presented at the hearing, and for the reasons set forth in this opinion, I find that the objection to the certification should be denied.

I. SCOPE OF EMPLOYMENT ISSUE.

A. FINDINGS OF FACT.

The following are my findings of fact, based on the evidence presented at the hearing.

1. Mary Katherine Hayden moved to the small town of Big Stone Gap, Virginia, in 1980, with her husband, a coal company executive, and their two sons. They lived in a residential neighborhood a short distance away from Wendell Caldwell.² Mr. Caldwell was a postal service employee, and until 1991 was the

² Mrs. Hayden testified in her direct examination that Mr. Caldwell's home was "catty-cornered" from her house. In a letter she wrote to Attorney General Ashcroft in 2001 that she introduced at the hearing (Pl.'s Ex. 6) she described Caldwell's house as "across the street" from hers. Actually, as she finally admitted at the hearing, and as shown by photographs introduced by the United States (Gov't Exs. 2-10), her home was on the opposite side of the street and up three houses. While the photographs were taken recently and thus the trees in the neighborhood are higher now than they were in the 1980s, the photographs clearly show the distance between the two homes.

postmaster at nearby Pennington Gap, Virginia. In 1991 he became the postmaster at Big Stone Gap. He retired at the end of 2001.

2. Mrs. Hayden contends that beginning in 1982 Caldwell began to “watch her” in the neighborhood, making her feel uncomfortable. She testified that he would stand on his lawn and watch her house for long periods of time, and look at her house as he went jogging. Based on the evidence, however, I find credible Caldwell’s testimony that he did not engage in any improper conduct while he and Hayden lived in the same neighborhood. Indeed, the only significant involvement between the families occurred when Caldwell called the police on several occasions to break up loud parties conducted at the Hayden home by their teenaged sons, when Mr. and Mrs. Hayden were out of town.³

3. Mr. and Mrs. Hayden separated in 1986, and in 1989 Mrs. Hayden moved to a different neighborhood. In that year, she also obtained a post office box at the Big Stone Gap post office. After Caldwell became the postmaster in 1991, Mrs. Hayden claims that he “hit on her” whenever she came to the post office to pick up her mail. She contends that he would call out loudly to her, embarrassing her, and would

³ The only attempted corroboration of Mrs. Hayden’s testimony as to Caldwell watching her was an affidavit by someone named Patrick Parsons, who stated that he had seen Mr. Caldwell “spying” on Mrs. Hayden. The United States objects to this affidavit, identified as plaintiff’s exhibit 13, as inadmissible hearsay. I agree, and will refuse the exhibit. In any event, the affidavit is without detail, and would not be persuasive even if admitted.

ask her “to go out,” even though he was married. She says that she refused his requests and told him she was not interested. She claims that thereafter on many occasions her mail was held and not put in her box, requiring her to go to the counter to pick it up. In addition, she asserts that some of her mail was improperly returned to the senders. She says that one piece of mail, a letter to her from Sen. Edward Kennedy, thanking her for a religious memorial she had sent to him upon the death of his nephew, John F. Kennedy, Jr., was held up in the post office for a month or so and the envelope “steamed open.” She also testified that a box of checks from her bank had been improperly returned to the bank, which she only learned when the box of checks was again sent by the bank to her and inside the box she found a post office notation that indicated the prior return.⁴ She says that a small parcel sent to her was not placed in her post office box, but kept for her to pick up at the counter, even though it would have easily fit into her box.⁵ She claims that a piece of mail addressed to her at East Stone Gap appeared in her box at Big Stone Gap.⁶ She blames Caldwell for all of these

⁴ The mailed box of checks indicates, however, that Mrs. Hayden’s correct Big Stone Gap post office box address was pasted by the sender over another address, which is hidden. It may be simply that the sender got the first address wrong, and that is why the mail was returned and then re-mailed. *See* Pl.’s Ex. 8.

⁵ *See* Pl.’s Ex. 10.

⁶ *See* Pl.’s Ex. 11.

incidents, as an effort by him to aggravate her, or “get her attention,” or in retaliation for her refusal to accept his romantic advances.

4. I accept Caldwell’s denial that he tampered with, or otherwise improperly diverted or misdirected any of Mrs. Hayden’s mail. Her claims are based entirely on speculation. For example, she assumes that the letter to her from Senator Kennedy was held up because she did not receive it for over a month after the date of the letter. However, the envelope does not have a postmark date, and I would not assume that a form letter such as this would necessarily have left the Capitol on the date the letter was produced. Moreover, while the envelope, which was introduced into evidence,⁷ appears to have come open, there is absolutely no evidence that it was steamed open. Moreover, I find that Mrs. Hayden did not visit the post office to get her mail on a regular basis, and that she received a relatively large amount of mail. Thus, it would not have been unusual for her post office box to have been full, thus requiring that additional mail be held for her.

5. Mrs. Hayden claims that on June 20, 1996, at 4:25 P.M., she came to the post office and picked up some mail from her box, and was told that there were packages for her in Caldwell’s office. Caldwell’s office had an opaque glass door leading from the public lobby, and also a separate clear glass door leading from the

⁷ See Pl.’s Ex. 12.

employee work area. Mrs. Hayden says that as soon as she came into Caldwell's office, he grabbed her hand and placed it on the outside of his trousers over his erect penis, moving her hand up and down, and said to her, "Feel that big thing. Feel the head on that big thing. Wouldn't you like to have that big thing in you?" Mrs. Hayden stated that she had been shocked and had immediately left the office, going through the door into the employee area, around the employee counter, and out into the public area. She testified that she had not contacted any law enforcement agency about the incident because she had been so upset. Thereafter, she obtained a post office box at another post office, in East Stone Gap, and had most of her important mail sent there, but she did keep her Big Stone Gap box and claimed that she had tried to pick up mail there only after regular hours, when she knew Caldwell would not be present.

6. I do not find Mrs. Hayden's testimony credible as to the alleged assault and I accept Caldwell's testimony that the incident did not occur. I find it improbable that Caldwell would have assaulted her in his office, when his office was easily assessable by other employees, and in fact contained a door by which employees could view the interior of the office. Moreover, based on the testimony of Postal Inspector Robert Fisher, who investigated Mrs. Hayden's allegations in 1998 after she filed a formal complaint, she has given different dates for the incident. More important, it appears that she changed the claimed date of the incident after Inspector Fisher advised

her then-attorney that the records showed that Jack Sturgill, a postal employee whom she claimed may have seen her enter the office, had not worked on the date first alleged by her. This change, under those circumstances, is indicative of fabrication. There is additional evidence of fabrication. Mrs. Hayden produced at the hearing a pocket calendar for 1996, which she says she also used as a diary, on which is written on June 20, “Wendell Caldwell sexually assaulted me in his office 4:30 today.” She claims that she wrote this note on that day, which is improbable in light of her claim that she did not report the assault to the police because she was “in shock” following the event. She also claims that she only recently found this diary and therefore was uncertain of the actual date during the early stages of the investigation of her claim. An examination of the dairy⁸ shows that the words were written in the margin of the page, and similar language written in the margin of other pages. For example, in the margin of the page for July 4, the words, “Wendell sexually assaulted me June ‘96,” are written. Rather than a contemporaneous writing, the notes are just as likely to be an after-the-fact effort to produce evidence of the date of the alleged assault. All-in-all, the controversy over the date leads to the conclusion that Mrs. Hayden has attempted to manufacture evidence to support her story, thus undermining her credibility in general.

⁸ See Gov’t Ex. 13.

7. Mrs. Hayden asserts that she continued to have problems with her mail and that Caldwell harassed her by following her once into a drug store and by sending her a birthday card on her fiftieth birthday. Caldwell denies any harassing conduct. He says that Mrs. Hayden frequently talked to him in his office, often about personal matters, and that while he used the same drug store as she did, he did not stalk her in any manner. I again find Caldwell's testimony credible. He in fact may have been in the drug store on an occasion when she was present, but I find that to be coincidental, and without sinister motive. Caldwell agreed that he gave her a birthday card at the post office one day when she told him of her birthday,⁹ but I do not find that action improper or part of any course of conduct to inflict harm on her, as claimed, but rather innocent. In fact, the characterization by Mrs. Hayden of these incidents as harassment undermines the credibility of her other claims.

8. Mrs. Hayden testified as to one other incident between her and Caldwell, which occurred before the alleged office assault, in 1993 or 1994. She claims that Caldwell came to her home on the pretext that because he was the postmaster at Big Stone Gap, he could afford a bigger home, and wished to see if he wanted to buy hers. She says that when she opened the door, he grabbed her, but she pushed him away and

⁹ Caldwell testified that Mrs. Hayden had told him that it was her fortieth birthday, but that he felt both of them had known that it was not really her fortieth birthday. She agreed at the hearing that it had been her fiftieth birthday.

closed the door. Caldwell agrees that he briefly visited her once, but only at her invitation, and because she wanted to show him her home. In light of Mrs. Hayden's other testimony, and based on my opportunity to generally judge her credibility, I reject her testimony and accept that of Caldwell.

9. Based on the testimony at the hearing, at least two employees of the postal service found Caldwell to be a difficult supervisor. Melanie Lynn Cooper testified that she quit because she felt Caldwell was unfair to her and treated her differently than male workers, and Lilly Williams testified that she had retired because of the stress caused by Caldwell as her supervisor. However, neither of these former employees corroborated any of the conduct claimed by Mrs. Hayden, nor did they testify to any similar conduct by Caldwell directed at others.

10. Mrs. Hayden eventually contacted an attorney, Edward Stout, and on her behalf he filed an administrative claim with the United States Postal Service on February 2, 1998, seeking recovery of damages because of the assault in Caldwell's office. The claim form recited that the incident had occurred on June 19, 1996,¹⁰ and alleged that it had occurred within the scope of Caldwell's employment. Thereafter, the postal service investigated and rejected the claim. Stout declined to represent Mrs.

¹⁰ At one point in the claim form, the date of the incident is given as June 14, but this appears to be an obvious typographical error. *See* Gov't Ex. 1.

Hayden further, but he prepared suit papers for her that she filed pro se in the Circuit Court of Wise County on February 1, 1999. In that action, she sought damages for intentional infliction of emotional harm against Caldwell on account of the assault in Caldwell's office, which she alleged had occurred in "June of 1996." She again alleged that Caldwell had been acting within the scope of his employment as postmaster "at all times."

11. The United States removed this first action to this court pursuant to the provisions of the FTCA, and the United States was substituted for Caldwell as the defendant. The United States moved to dismiss the action on the ground, among others, that the court was without jurisdiction because the plaintiff had failed to properly exhaust her administrative remedies under the FTCA by incorrectly completing the administrative claim form. At this point in the litigation, Mrs. Hayden obtained a new attorney, John Martin, who appeared with her at the hearing on the government's motion to dismiss. The attorney conceded the government's position, and I accordingly dismissed the action on the basis of lack of subject-matter jurisdiction. Thereafter, Mrs. Hayden obtained her third attorney, Anthony Collins, who filed a motion to vacate the dismissal, arguing for the first time that Caldwell was not acting within the scope of his employment at the time of the alleged assault. Treating the motion as a timely motion to alter or amend judgment under Federal Rule

of Civil Procedure 59(e), I denied relief because the motion attempted without cause to raise an argument not made before judgment.¹¹

12. Thereafter, Mrs. Hayden retained her present attorneys (her fourth and fifth) and filed the present action on September 18, 2001. Both Mrs. Hayden and her counsel wrote letters to public officials in 2001 complaining of the conduct she attributes to Caldwell.¹²

13. Mrs. Hayden testified that after she had made her claim to the postal service, a suspicious fire occurred on her property and one of the windows in her automobile was shot out. There is no evidence as to who caused these events, even assuming they occurred, and certainly no evidence they were related to Caldwell. She also claims that after the dismissal of her first suit, she received an anonymous note stating, “You lost big time. Hope you’re happy. I am very happy. Merry Christmas. Ho Ho.” This alleged note was not produced at the hearing,¹³ but even if it existed, and

¹¹ See *Hayden v. United States*, No. 2:99CV00042 (W.D. Va. Jun. 9, 2000).

¹² See Pl.’s Exs. 2 (letter to Senator Kennedy), 3 (letter to Senator Allen), 4 (letter to Senator Rockefeller), 5 (letter to Senator Warner), 6 (letter to Attorney General Ashcroft), and 7 (letter to Postal Service district manger). While the United States did not object to the introduction of these letters, they do not support her case, since they are simply self-serving recitations of her claims, made long after the fact. In fact, they detract from her general credibility, since they contain other implausible assertions by her, such as her contentions that her life has been threatened and that Mr. Caldwell has been protected by his political connections. See, e.g., Pl. Ex. 6.

¹³ Mrs. Hayden’s attorney asserted that the note could not be located, but represented that he had seen it at one time.

even if by inference it is attributable to Caldwell, it does not supports any of Mrs. Hayden's claims of harassment.

14. Based on all of the circumstances, and based on my opportunity to judge the credibility of the witnesses after having observed them testify, I find that Mrs. Hayden's accusations against Caldwell are not credible and that the events she has described, namely, that he grabbed her at her home and that he assaulted her at his office, did not occur. I also find that Caldwell did not open, tamper with, hold or divert her mail as claimed, nor has he otherwise harassed, threatened or stalked her in any manner. In short, I find that the conduct of Caldwell that she says constituted the intentional infliction of emotional harm did not happen.

B. ANALYSIS AND CONCLUSIONS OF LAW.

The Westfall Act¹⁴ provides that when a tort suit is brought against a federal employee, the Attorney General (or his designees, the United States attorneys within their respective districts¹⁵) may certify that the employee was acting within the scope of employment at the time of the conduct on which the suit is based and remove the action to federal court. The United States may then be substituted in place of the

¹⁴ The Federal Employees Liability and Reform Tort Compensation Act of 1988, 28 U.S.C.A. § 2679(d) (West 1994), is known as the Westfall Act because it abrogated a holding of the Supreme Court in *Westfall v. Erwin*, 484 U.S. 292 (1988).

¹⁵ See 28 C.F.R. § 15.3(a) (2001).

employee defendant.¹⁶ The certification does not, however, conclusively establish the substitution.¹⁷ When the certification is contested, as here, it serves as prima facie evidence only and the plaintiff may show that the federal employee was not acting within the scope of his employment.¹⁸ Where the plaintiff presents “persuasive evidence refuting the certification,” the burden shifts to the United States to “provide evidence and analysis to support its conclusion that the torts occurred within the scope of employment.”¹⁹

In the situation where the scope of employment is in question the court should allow limited discovery and conduct an evidentiary hearing in order to resolve all factual issues.²⁰

In the present case the United States asserts that the federal employee was acting within the scope of his employment because the alleged conduct that is the subject of the action did not in fact occur. In other words, it is the position of the United States

¹⁶ See 28 U.S.C.A. § 2679(d)(2).

¹⁷ See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995).

¹⁸ See *Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1153 (4th Cir. 1997) (on remand from Supreme Court).

¹⁹ *Maron v. United States*, 126 F.3d 317, 323 (4th Cir. 1997).

²⁰ See *id.* The determination of scope of employment must be made with reference to state law. See *Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d at 1156. The scope of employment under Virginia law with reference to the commission of an intentional tort depends largely on the facts. See *Webb v. United States*, 24 F. Supp. 2d 608, 614 (W.D. Va. 1998).

that since Mr. Caldwell did not do any of the acts complained of, by necessity he must have been acting within the scope of his employment.

There is some diversity of opinion as to whether the government may show under the Westfall Act that the employee acted within the scope of his employment by proving false the conduct alleged to be outside of such scope.²¹ However, the Fourth Circuit, in its recent *Borneman* opinion,²² adopted the view that if the government asserts as a basis for its certification that the conduct did not occur, any such factual dispute is to be decided by the district court.²³

Accordingly, even assuming that Mrs. Hayden presented sufficient evidence to overcome the prima facie nature of the government's certification, I find that the United States has proved, by a preponderance of the evidence, that the conduct complained of did not occur. The objection to the certification must thus be overruled.

It is true that Mrs. Hayden complains of some conduct that took place outside of the post office and was completely unconnected to any government business. For

²¹ Compare *Wood v. United States*, 995 F.2d 1122, 1128-29 (1st Cir. 1993) (holding that government cannot deny the conduct complained of for the purposes of its Westfall certification), with *Kimbrow v. Velten*, 30 F.3d 1501, 1507 (D.C. Cir. 1994) (holding to the contrary), and *Melo v. Hafer*, 13 F.3d 736, 746-47 (3d Cir. 1994) (same).

²² *Borneman v. United States*, 213 F.3d 819 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001).

²³ See *id.* at 827-28.

example, she claims that Mr. Caldwell spied on her while they were neighbors from 1982 until 1989, when she moved away. That conduct has no relationship with Caldwell's duties as postmaster, and in fact he did not become the postmaster until 1991, long after Mrs. Hayden had moved away. However, the plaintiff makes it plain that her cause of action here relies on the totality of the alleged conduct and not any of the instances alone.²⁴ Otherwise, of course, the applicable statute of limitations might bar any recovery for much of the claimed tortious incidents on the ground that they were isolated and not continuous conduct.²⁵

In summary, I overrule the plaintiff's objection to the certification by the United States on the ground that the United States has proved by a preponderance of the evidence that the conduct complained of occurred within the scope of employment of the employee in question.²⁶

²⁴ See Pl.'s Mem.1-2.

²⁵ In Virginia, the period of limitations for the intentional infliction of emotional harm is two years. See Va. Code Ann. § 8.01-243(A) (Michie 2000); *Moore v. Allied Chem. Corp.*, 480 F. Supp. 364, 369 (E.D. Va. 1979). While there are no Virginia cases on point, other courts have held that where the acts are continuous and of a similar nature, the limitations period for the tort of intentional infliction of emotional harm does not commence until the last act occurs. See, e.g, *Pavlik v. Kornhaber*, 761 N.E.2d 175, 186-87 (Ill. App. Ct. 2001).

²⁶ The plaintiff's objection to the certification also requests that this action be remanded to the state court. However, as to removal, the certification by the United States attorney is conclusive and is not subject to objection. See *Gutierrez de Martinez v. Lamagno*, 515 U.S. at 434-35; *Borneman v. United States*, 213 F.3d at 825-26.

III. MOTION FOR EXTENSION OF TIME TO PRESENT FURTHER EVIDENCE.

At the conclusion of the hearing on March 4, plaintiff's counsel requested additional time to present further testimony of certain physicians who had treated the plaintiff, and who would allegedly corroborate her claim as to Mr. Caldwell's conduct. Over the objection of the United States, I allowed the plaintiff two weeks (until March 18, 2002) to submit a signed written statement of each such proposed witness setting forth in detail the testimony such witness would give if allowed by the court. I advised the parties that following the submission of such statements, I would determine if further evidence would be allowed.

Only one such signed statement has been submitted, along with a motion for an extension of time to submit further statements. The motion will be denied and I will not allow any further evidence.

The sole signed statement submitted was from William A. Wiley, Jr., M.D., who stated only that:

Mrs. Hayden has been under my care for treatment of symptoms of major depression and anxiety since 1987. It is my opinion that her condition has been aggravated by the incident which occurred on June 20, 1996.

Even if presented by testimony in court, this bare statement does not corroborate any of Mrs. Hayden's accusations against Mr. Caldwell. Moreover, it is clear from the motion that counsel does not have any actual knowledge of the substance of the

testimony from any of the other claimed witnesses. Whether or not they would have admissible testimony relevant to the question before the court is simply speculation. It would not be proper to further delay this action for additional investigation, as requested. The parties have had a full and fair opportunity to present relevant evidence and the plaintiff has not shown sufficient cause to be allowed an additional hearing.²⁷

IV. CONCLUSION.

For the foregoing reasons, it is **ORDERED** as follows:

1. The Motion for Extension (Doc. No. 27) is denied;
2. The Motion to Remand (Doc. No. 6) is denied; and
3. Because the court has determined that the conduct by the government employee did not in fact occur and that the employee did not intentionally inflict emotional harm on the plaintiff, the plaintiff must show cause, if any she can, within twenty days of the date of entry of this order, why the court should not enter judgment on the merits for the United States.

²⁷ While Mrs. Hayden's counsel claims that they did not fully understand that a crucial issue at the hearing would be the government's contention that the conduct attributed to Mr. Caldwell did not in fact occur, any such misunderstanding is belied by the government's pre-hearing motion for a psychological examination of Mrs. Hayden and the court's written ruling on that motion. In both the government's memorandum in support of its motion, and the court's written opinion, the question for resolution at the hearing was made clear. No motion for a continuance of the hearing was made. Indeed, the plaintiff presented six witnesses and numerous exhibits in an effort to persuade the court that the alleged conduct did occur.

ENTER: March 22, 2002

United States District Judge